No. 12198

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA, DEPARTMENT OF EMPLOYMENT,
Appellant, Petitioner,

v.

FRED S. RENAULD & CO., Debtor and George Gardner, Receiver of the Estate of Fred S. Renauld & Co., Debtor,
Appellees.

PETITION FOR REHEARING

FRED N. HOWSER
Attorney General

CHAS. W. JOHNSON
Deputy Attorney General

VINCENT P. LAFFERTY
Deputy Attorney General
400 Plaza Building
Sacramento 14, California

Attorneys for Appellant, Petitioner State of California, Department of Employment

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

STATUTES CITED

OTHER SOURCES

No. 12198

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA, DEPARTMENT OF EMPLOYMENT,
Appellant, Petitioner,

v.

FRED S. RENAULD & CO., Debtor and George Gardner, Receiver of the Estate of Fred S. Renauld & Co., Debtor,
Appellees.

PETITION FOR REHEARING

The Appellant State of California, Department of Employment, in the interests of substantial justice and as hereinafter set forth, hereby respectfully petitions this court for a rehearing in the within appeal which was ordered dismissed by opinion of the court filed October 3, 1949.

STATEMENT OF FACTS

The appellant herein filed an appeal from an order of the district court upon a petition for review affirming an order of a referee in bankruptcy. This appeal was taken for the purpose of securing, on behalf of the State of California and its taxing agencies, an authoritative precedent upon a vitally important question of law.

In so doing and through inadvertence the appellant miscalculated the procedural necessities involved and failed to comply with those specified in Section 24 (a) of the Bankruptcy Act, 11 U. S. C. A. Sec. 47 (a), and the bankruptcy rule of this court. Under these circumstances, the monetary amount actually involved in this appeal being $44.01 less than that which would suffice to authorize appeal as a matter of right, after briefs were filed upon the merits of the case and hearing thereon was had, this court, pursuant to its unquestioned discretion so to do, ordered the appeal dismissed.

GROUNDS OF PETITION FOR REHEARING

Your appellant bases its petition that this court exercise its discretion to consider the notice of appeal filed with the District Court as an irregular application to the Court of Appeals for the Ninth Circuit for leave to appeal, on the following grounds:

1. While such notice was procedurally irregular, this court, as pointed out in the opinion herein, is not without jurisdiction to treat such filing as an informal substitute for the petition for allowance of an appeal prescribed by Section 24 (a) of the Bankruptcy Act.

> *Reconstruction Finance Corporation* v. *Prudence Group,* 311 U. S. 579 (1941).

2. Substantial justice requires that a decision be rendered on the merits of the question involved.

(a) The interpretation placed by appellant upon the $3,000 limitation on wages considered taxable is a basic one involving 236,625 registered employers in the State of California alone.

(b) In the year 1949, your appellant, Department of Employment—which is but one of the taxing agencies of the State of California which such a decision would affect—has filed tax claims in 950 individual bankruptcy proceedings pursuant to the Unemployment Insurance Act (3 Deering's General Laws of California, Act 8780D). In each adjudicated bankruptcy proceeding that contemplates the appointment of a trustee to operate the business of a debtor, the same issue as is presented by the appeal arises, namely, whether a new entity comes into existence. The construction of the statute sought to be secured by the within appeal is basic in appellant's administration of the Unemployment Insurance Act and affects the taxes assessed against all bankrupt estates in which a change of entity has occurred.

(c) Your appellant, Department of Employment, alone, presently has tax claims on file on behalf of the State of California in 1,400 pending bankruptcy proceedings.

(d) There is no authoritative decision of a court of the State of California by which courts of bankruptcy in this State may be guided. The cases of *J. F. Barrett and Harry H. Hilp* v.

California Employment Commission, Superior Court, San Francisco No. 341890 (1945), and *California Employment Commission* v. *Ransohoff's, Inc.,* Municipal Court, San Francisco No. 169784, Appellate Department of the Superior Court, San Francisco No. 1618 (1944), are the only judicial expressions upon the merits of the question neither of which is binding authority upon federal courts sitting in California under the principles of *King* v. *United Commercial Travellers,* 333 U. S. 153, 92 L. Ed. 609 (1949), 68 S. Ct. 488. (Appellant's Opening Brief, pp. 16-25.)

(e) Substantial justice in the administration of bankruptcy estates requires a decision by this honorable court on the merits of the appeal to achieve uniformity of decision by the various referees in bankruptcy and district courts confronted therewith to the end that bankrupt estates be not burdened with taxes erroneously assessed. The frequency with which this problem arises in construction of the Federal Bankruptcy Act indicates the propriety of a decision on the merits by a federal court even though no reliable assistance is afforded by the state forum. It is respectfully submitted that absence of specific and relevant state decisions should not deter consideration of the problem by this

court nor should it operate to require the parties to litigate the matter in the courts of California. *Meredith* v. *Winter Haven,* 320 U. S. 228, 64 S. Ct. 7, 88 L. Ed. 9 (1943).

(f) Despite the small amount of tax involved in this particular appeal, the problem presented by the merits is one of major importance in the administration of the social legislation sought to be construed, particularly with reference to the Federal Bankruptcy Act. It is respectfully urged that this appeal does not fall within the classification of those which are "too unimportant to be entitled to further consideration by an appellate court, regardless of issues involved" (Senate Hearings on H. R. 8046, 75th Congress, 2d Session (1937-1938), 105 commenting on the reason for the $500 limitation). The scope or importance of the issue may not be judged adequately or at all by the amount herein involved. The purpose of the proviso relating to the $500 limitation is to exclude "the appeal of trifling and inconsequential disputes" (2 Collier on Bankruptcy, 14th Ed., 799, par. 24.42, Ch. VII). As hereinbefore indicated, despite the $44.01 lack of sufficiency, the issue presented by the appeal is neither "trifling" nor "inconsequential."

3. While appellant's subsequent diligence in prosecuting the within appeal is not urged as a substitute

for its proper initiation, appellant respectfully addresses the court's attention to the reasons assigned by it for the allowance of an appeal, seasonably applied for, in *Holmes* v. *Davidson* (C. C. A. 9, 1936), 84 F. (2) 111 as follows:

> "* * * We will allow the appeal to this Court. In so doing we are influenced by the fact that the matter has been fully presented by briefs and transcript and argument on the merits."

The exercise by this court of its discretion, "where the scope of review is not affected, to disregard such an irregularity in the interests of substantial justice" (*Reconstruction Finance Corp.* v. *Prudence Group* (supra) would not jeopardize the rights of the appellees who assisted in the preparation of the agreed statement pursuant to Rule 76, Federal Rules of Civil Procedure (28 U. S. C. A. following Sec. 723c), and appeared in this court by briefs and it would provide an important aid to the solution of a frequently met problem in the administration of important federal legislation.

CONCLUSION

While appellant is not aided by special equities in the form of mistaken reliance upon incorrect legal precedent as in *Reconstruction Finance Corp.* v. *Prudence Group* (supra) it respectfully and for the reasons assigned petitions for rehearing of the order dismissing the appeal and the allowance thereof in the interests of substantial justice.

Respectfully submitted.

FRED N. HOWSER
Attorney General

CHAS. W. JOHNSON
Deputy Attorney General

VINCENT P. LAFFERTY
Deputy Attorney General
Attorneys for Appellant, Petitioner State of California, Department of Employment

o